



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

REGION VII

Des Moines Field Office
Federal Building
210 Walnut Street, Room 239
Des Moines, Iowa 50309-2111

January 12, 2012

MEMORANDUM FOR: [REDACTED]

FROM:  James V. Provenza III, Associate Regional Counsel, 7BC

SUBJECT: [REDACTED] - Conflict of Interest
Inquiry

This memorandum responds to your request for guidance regarding a possible conflict of interest at the above-referenced projects. [REDACTED] are uninsured projects receiving project-based rental assistance under Section 8 Housing Assistance Payments (HAP) Contracts. The [REDACTED] is the contract administrator for the HAP Contracts. The Chief Financial Officer (CFO) of [REDACTED] also serves as the President of the project owners' Board of Directors.

Issue

You inquired whether allowing [REDACTED] CFO to serve as the President of the Board for the projects violates the Annual Contributions Contract (ACC) between HUD and [REDACTED] or otherwise creates a conflict of interest.

Conclusion

In response to your inquiry, Counsel reviewed HUD regulations, the ACC, the HAP Contracts, and written correspondence from [REDACTED]. As detailed below, Counsel determined that allowing [REDACTED] CFO to serve as the President of the Board for the projects violates paragraph 10 of the ACC, which prohibits [REDACTED] from entering into contracts in which officers of [REDACTED] have a direct or indirect interest. Housing may waive the conflict of interest for good cause under paragraph 10(g) of the ACC.

Analysis

Unlike tenant-based Section 8 rental assistance, there are no regulations addressing conflicts of interest as they relate to project-based Section 8 rental assistance. HUD imposes conflict of interest requirements at projects with HAP Contracts through

ACCs and the HAP Contracts themselves. Paragraph 10 of [REDACTED] ACC provides the following, in part:

Neither the PHA, nor any PHA contractor, subcontractor or agent . . . may enter into any contract, subcontract, or other arrangement . . . in which any covered individual or entity has any direct or indirect interest . . . while such person is a covered individual or entity or during one year thereafter.

Similarly, Section 24 of the HAP Contracts provides the following, in part: "No member, officer, or employee of the PHA . . . shall have any interest, direct or indirect, in this Contract or in any proceeds or benefits arising from it." One function of these provisions is to prevent employees of governmental housing agencies like [REDACTED] from acquiring interests in contracts that might hinder the employees' ability to impartially carry out their governmental duties.

Paragraph 10(c)(1) of the ACC defines "covered individual" to include officers of the PHA; thus, the CFO of [REDACTED] is a covered individual subject to the conflict of interest requirements of the ACC. The issue is whether the CFO has any direct or indirect interest in the HAP Contracts affecting the projects. In an email to [REDACTED] Section 8 Director dated December 15, 2008, [REDACTED] General Counsel opined that there is no conflict of interest because the CFO does not have an ownership interest in the projects. Without a financial stake in the projects, he argues, the CFO has no interest in the stream of payments from the HAP Contracts. However, Counsel is inclined to believe that HUD, in drafting the ACC, chose its words carefully, and would have qualified "interest" with "financial" or "ownership" if it had intended to capture only that category of interests. Accordingly, "direct or indirect interest" should be interpreted broadly to include any sort of interest the CFO may have in the HAP Contracts.

While the CFO may not have a pecuniary interest in the HAP Contracts¹, as President of the owners' Board of Directors, he certainly has an interest in those Contracts insofar as he is charged with ensuring the financial viability of the projects. Without the regular and substantial income stream from the HAP Contracts, that viability would be threatened. The CFO's interest in the HAP Contracts, and the financial stability they bring to the projects, could conceivably prevent him from impartially carrying out his duties at [REDACTED]. For example, as a high-ranking officer of [REDACTED], he could cause the project to receive more rental assistance than it is entitled to, or persuade [REDACTED] to adopt a lenient approach in addressing the owners' HAP Contract violations. By entering into HAP Contracts in which an [REDACTED] officer has a direct (albeit non-financial) interest, [REDACTED] violated paragraph 10 of the ACC and created a conflict of interest.

If [REDACTED] and the project owners would like the CFO to continue to serve as President of the Board, [REDACTED] must submit a waiver request to HUD in accordance with paragraph 10(g) of the ACC. While paragraph 10(g) states that such a waiver must be

¹ Counsel recommends that Housing confirm that the CFO is not receiving any compensation for his services as President of the owners' Board of Directors. If the projects are compensating him, he clearly has a pecuniary interest in the HAP Contracts, creating a conflict of interest.

"for good cause", the ACC does not provide a list of factors for HUD to consider when deciding whether to grant a waiver. If [REDACTED] requests a waiver, Counsel recommends that Housing refer to the Office of Community Planning and Development regulations at Section 570.611(d) of Title 24 of the Code of Federal Regulations (CFR) in making the waiver decision. Those regulations, which address conflicts of interest related to Community Development Block Grants, are not applicable to the case at hand, but may nonetheless help facilitate Housing's decision making process. For example, Housing may want to consider whether a waiver "would provide a significant cost benefit or an essential degree of expertise" to the projects (see 24 CFR 570.611(d)(2)(i)). Housing may also want to request an attorney's opinion from [REDACTED] confirming that the waiver would not violate State or local law (see 24 CFR 570.611(d)(1)(ii)).

In the event that HUD grants a waiver and allows the CFO to continue serving as the Board President of the projects, paragraph 10(g) provides the following: "Any covered individual for whom a waiver is granted may not execute any contract administration functions or responsibility concerning a HAP Contract in which such individual or entity is a party or has any interest." In your inquiry, you noted that, if a waiver is granted, "we need a definition provided as to what matters [REDACTED] considers related to the Section 8 contract" While it may be worthwhile to confer with [REDACTED] and develop a preliminary list of documents that the CFO may not sign or otherwise influence, such a list is not likely to include every relevant document, given the extensive network of paperwork related to Section 8 projects. Therefore, Counsel recommends that Housing qualify any such list with "including, but not limited to, the following documents:."

If you have any questions regarding this memorandum, or would like to discuss this matter further, please contact me at extension 4496.